Supreme Court, U.S.
JAN 23 2003

No. 02-916

IN THE

Supreme Court of the United States

BECKY M. LITOWITZ,

Petitioner,

v.

DAVID J. LITOWITZ,

Respondent.

On Petition for Motion for Reconsideration to the Supreme Court of the State of Washington

REPLY BRIEF TO OPPOSITION TO REVIEW

RICHARD D. ACKERMAN *
GARY G. KREEP
UNITED STATES JUSTICE FOUNDATION
2029 East Valley Parkway, Suite 1-C
Escondido, CA 92027
(760) 741-8086

* Counsel of Record *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTRODUCTION

Respondents' opposition to review hinges on three notions: (A) The courts of this nation do not recognize preborn human life as deserving of any special protection[1]; (B) In order to have a constitutionally protected interest as a "parent," one must have biological ties to his or her children[2]; and, (C) That the states have a right to trump the Constitution by solely relying on state contract law[3]. These contentions actually underscore the need for review of the basic human rights at issue.

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[1] Brief in Opposition at p. 1-3.

[2] *Id.* at 1, 3-4.

[3] *Id.* at 4-5. Even though the right to be a parent is at the core of a decision to participate in IVF technology, Respondent claims that no federal right was adjudicated by Washington.

The State of Washington's opinion below is at odds with this Court's recognition that unborn life has value which can, and should be, protected where there is no competing interest of a gestational parent.

Secondly, while there is no case by this Court directly stating so, the precedent set by the State of Washington degrades the implicit fundamental rights of surrogate, adoptive, and donor parents.

Finally, Washington's interpretation of contract law is at odds with the constitutional rights of the parties, and others similarly participating in the offerings and promise of modern reproductive technology.

ARGUMENT IN REPLY TO OPPOSITION TO REVIEW

I. RESPONDENT MISSTATES THE LEGAL STATUS OF EMBRYONIC LIFE

Respondent refers to the embryos, his genetic offspring, as "disputed objects," yet fails to recognize that the same type of "object" resulted in the birth of a daughter to Petitioner and Respondent. (Appendix C at p. 6a, fn. 12). The embryos possess an intrinsic value that encompasses the potential for all that it is to be human. This should not be an interest treated lightly by this Court. If Respondent's position on the status of preborn human life is taken as an accurate reflection of how the Washington Supreme Court's ruling, and a potential denial of review by this Honorable Court, should be interpreted by all states, an impending constitutional disaster is afoot.

Interpretation of the United States Constitution suggests that unborn human life is more than a "disputed object." While it is true that the courts have never recognized unborn human beings as "persons," in any complete sense, it is not necessarily true that treating them as 'special interests' is

against public policy and a neutral reading of the United States Constitution. *See generally Roe v. Wade*, 410 U.S. 113, 150 (1973). As indicated in the Petition, several of the states do recognize the 'special interest' in embryonic life. (Petitioner's brief at pp. 4-7). Consistent with the recognition of a 'special interest,' the Washington trial court properly appointed a guardian *ad litem* to the embryos. (Appendix C, p. 11a fn. 31). Respondents callous redefinition of "embryos" is not supported by existing precedent, the facts of this case, or raw confrontation with the reality of how human life is reproduced.

The unconstitutionality of failing to recognize the special status of the embryos, and Petitioner's interests in them, was sufficiently raised below. (Appendix C at p. 15a, 17a, 21a fns. 88-89). Justice Chambers of the Washington Supreme Court recognized that resolution as to the status of the embryos was not had, and suggested remand for further consideration "based on contract principles, equity, and public policy." (Appendix B at p. 2a). Remand did not occur, and the "public policy" issues referred to by Justice Chambers are unresolved in the face of conflicting state opinions, and this Court's own recognition of the value of preborn human life. *Roe* at 150, 154.

Public policy, concerning new reproductive technologies, does not support the conclusion that human embryos are per se' 'parentless,' and thus unworthy of this Court's recognition and protection of them as special interests under the United States Constitution. Human embryonic life, absent compelling conflicts, is always deserving of protection against destruction. The interests in preserving the sanctity of life and responsible parenthood are especially compelling where the privacy interests contemplated by *Planned Parenthood of Southeaster Pa. v. Casey*, 505 U.S. 883 (1992) are not

implicated. The issue was addressed squarely by Justice Blackmun when he stated that:

> "Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on the acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone. [...] [A] state may properly assert important interests in . . . protecting potential life." *Roe v. Wade*, 410 U.S. 113, 150, 154 (1973).

Here, preborn human life hangs in an undefined constitutional balance, and this Court has already acknowledged the value of protecting all jeopardized interests presented under these facts. *Id.* The State of Washington's decision, "based solely on state contract law," is illustrative of the very need for review in this case. Petitioner contends that the Constitution requires more than simple contractual analysis when the potential for life, or imminent destruction, of human beings is at stake.

With the advent of human cloning at the forefront of the Nation's headlines, and the reality that not all 'parents' are biologically related to the children they bring into existence, it is important that some guidance be given as to the constitutional rights and obligations of those availing themselves of new reproductive technologies. At a bare minimum, Petitioner respectfully requests that this Court give the states a basic constitutional assessment of what is minimally required to insure against the trampling of the rights of parents and the interests of the unborn.

II. PETITIONER'S BIOLOGICAL RELATIONSHIP TO THE EMBRYOS IS NOT RELEVANT TO THE CONSTITUTIONAL RIGHTS AT STAKE

Public policy supports Petitioners attempt to become a responsible parent in the eventuality of the birth of the embryos. The United States Constitution protects the interest in becoming a parent. Petitioner has a clearly established legal interest in the embryos under California law, and the State of California's view of the constitutional right to be a parent. In *Re Marriage of Buzzanca*, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280 (1998). The opinion of the Washington Supreme Court is in direct conflict with the constitutional analysis by the California Supreme Court in *Buzzanca*. As such, there is the type of conflict which justifies review under United States Supreme Court Rule 10.

If the opinion of the Washington State Supreme Court is left standing, the constitutionally recognized interest of Petitioner in the familial relationship between herself and the unborn embryos is destroyed even though "[t]he parent child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." *California Family Code* §§ 7601, 7602; *Shin v. Kong*, 80 Cal.App.4th 498, 95 Cal.Rptr.2d 304, rev. den'd (2000).

Here, Respondents conveniently overlook the fact that Petitioner is indeed the legal parent of a sibling of the embryos. Petitioners lack of a biological connection to the embryos, or their sibling, is irrelevant to Petitioner's constitutional and statutory status in the State of California. *Buzzanca* at 61 Cal.App.4th 1415-1417. Again, the Washington Supreme Court's decision is at loggerheads with California law and this Court's own definitions of what it means to be a "parent." *Cf., Johnson v. Calvert*, 5 Cal.4th 84, 100-101, 19 Cal.Rptr.2d 494 (1993) [acknowledgment that the Uniform Parentage Act does not create unequal rights].

Also see California Family Code §§ 7601, 7610 [rights of adoptive parents and required proof for parentage].

This Court's treatment of the scope of non-biologically related 'parents' is not subject to ready application to IVF contracts and other similar technological advances. While these technologies push the definitions of what is meant by 'natural family,' the law is ostensibly silent as to what rights are conferred on participants. *Cf., Troxel v. Granville*, 530 U.S. 57 "2000); *Webster v. Reproductive Health Services*, 492 U.S. 490, 522 "1989).[4] The bottom line is that tens of thousands of babies are being created by reproductive technologies, and there is no constitutional guidepost by which the children and their parents can rely for determination of their fundamental rights, or the lack thereof.

Public policy supports the conclusion that, regardless of biological connections to embryonic life, Petitioner and similarly situated persons have equal rights of parentage and concomitant rights, even during the IVF gestational process. *Buzzanca, supra* at 1416-1417. For good reason, "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one." *Lassiter v. Department of Social Services,* 452 U.S. 18, 27 (1981). The conflict of law between Washington, California, Tennessee, New York, Massachusetts, and Virginia warrants

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[4] A search of WestLaw's database indicates that there is only one opinion where "in vitro" fertilization methods are expressly mentioned. I.e., *Webster v. Reproductive Health Services.* Human cloning technology has little or no treatment by the United States Supreme Court. A search of all published federal appellate decisions renders no better results. Yet, "From 1995 to 1998, the most recent year for which national data are available, in vitro fertilization procedures increased by 37 percent, from about 59,000 to about 81,000, and the number of clinics rose by 28 percent, from 281 to 360." *See* Gina Kolata, "*Fertility, Inc.: Clinics Race to Lure Clients*," The New York Times, January 1, 2002.

review by this Court, especially since fundamental rights and important public policy are at issue.

III. CONTRACTUAL RELATIONS DO NOT TRUMP FUNDAMENTAL RIGHTS

Contrary to Respondent's assertions, legislative creations, such as state-based contract laws, cannot compete against the Constitutionally protected parent-child liberty, privacy, and associational interests that "derive from blood relationship, state law sanction, and basic human right . . ." *Smith v Organization of Foster Families (OFFER)*, 431 US 816, 846 (1977). If the position of Respondent and the State of Washington is accepted, there will be a devastating effect on the parental rights of adoptive, IVF, and donor parents.

CONCLUSION

Review should be granted in this case.

Respectfully submitted:

RICHARD D. ACKERMAN *
GARY G. KREEP
UNITED STATES JUSTICE FOUNDATION
2029 East Valley Parkway
Suite 1-C
Escondido, CA 92027
(760) 741-8086

* Counsel Of Record